

DEC 28 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,
v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTION PRESENTED

Does the exemption "from all other law" in the Interstate Commerce Act, 49 U.S.C. § 11341(a), which applies to a railroad participating in a transaction that has been approved by the Interstate Commerce Commission, extend to claims that are based on the railroad's contracts and are asserted exclusively under federal law?

**LIST OF PARTIES
AND RULE 28.1 LIST**

The names of the parties to the proceeding are contained in the caption.¹

The common stock of petitioners Southern Railway Company and Norfolk and Western Railway Company is wholly owned by Norfolk Southern Corporation. The other subsidiaries and affiliates of petitioners are: Southern Railway Company subsidiaries:

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Atlantic and Charlotte Air Line Railway Company,
The
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Charlotte-Southern Hotel Corporation
Chattanooga Station Company
Chattanooga Terminal Railway Company
Cincinnati New Orleans and Texas Pacific Railway
Company, The

¹ The decision of the Court of Appeals also covered the court's Case No. 88-1724, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*. The parties in Case No. 88-1724 were petitioner Brotherhood of Railway Carmen, Division of Transportation-Communications International Union; respondents Interstate Commerce Commission and United States of America; and intervenor CSX Transportation, Inc. The two cases were not formally consolidated—indeed, a motion for consolidation filed by the labor union parties was denied—but they were argued before the same panel on the same day. Petitioners Southern Railway Company and Norfolk and Western Railway Company understand that CSX Transportation, Inc. will also be filing a petition for a writ of certiorari with respect to the D.C. Circuit decision for which review is sought herein.

Citico Realty Company
Elberton Southern Railway Company
Georgia Midland Railway Company, The
Georgia Northern Railway Company, The
Georgia Southern and Florida Railway Company
Highpoint, Randleman, Asheboro and Southern
Railroad Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railway
Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
National Investment Company, The
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad
Company
North Carolina Midland Railroad Company, The
St. Johns River Terminal Company
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk and Western Railway Company subsidiaries:

Chesapeake Western Railway
 Fort Wayne Union Railway Company
 Lake Erie Dock Company
 Norfolk and Portsmouth Belt Line Railroad
 Company
 Scioto Valley and New England Railroad Company,
 The
 Shenandoah-Virginia Corporation
 Toledo Belt Railway Company, The
 Wabash Railroad Company

Norfolk Southern Corporation subsidiaries (in addition to Southern Railway Company and Norfolk and West- ern Railway Company):

Arrowood-Southern Corporation Company
 Arrowood-Southern Executive Park, Inc.
 Atlantic Investment Company
 Charlotte-Southern Corporation
 Lamberts Point Barge Company, Inc.
 Lamberts Point Docks, Inc.
 Nickel Plate Improvement Company, Inc.
 Norfolk Southern Industrial Development
 Corporation
 Norfolk Southern Properties, Inc.
 North American Van Lines, Inc.
 NS Fiber Optics, Inc.
 NS Transportation Brokerage Corporation
 NW Equipment Corporation
 Pocahontas Development Corporation
 Pocahontas Land Corporation
 Sandusky Dock Corporation
 Triple Crown Services, Inc.
 Virginia Holding Company

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern") request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which was entered on July 25, 1989, and amended on September 29, 1989.

OPINIONS BELOW

The July 25, 1989 decision of the Court of Appeals is reported at 880 F.2d 562 and is reprinted in the Appendix to this Petition ("App.") at 1a. The Court

of Appeals' order of September 29, 1989, amending the decision, is not reported and is reprinted in the Appendix at 27a. The decision of the Interstate Commerce Commission dated May 28, 1988, which was the administrative decision under review in the Court of Appeals, is not reported and is reprinted in the Appendix at 29a.

JURISDICTION

The Court of Appeals entered its decision on July 25, 1989. NW and Southern filed a timely petition for rehearing, which was denied in an order entered on September 29, 1989. This petition is timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

49 U.S.C. § 11341(a), a section of the Interstate Commerce Act, provides:

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and

operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

STATEMENT OF THE CASE

In 1982, the Interstate Commerce Commission ("ICC") approved the coming together of NW and Southern, petitioners here, under the common control of Norfolk Southern Corporation ("Norfolk Southern"). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173 (1982) ("Norfolk Southern Control"). The ICC authorized the consolidation of facilities among the various Norfolk Southern-controlled railroads in the interest of operational efficiency, and directed, in accordance with a provision of the Interstate Commerce Act, 49 U.S.C. § 11347, that employees affected by any such consolidations—including those not detailed in the original Norfolk Southern operating scheme—were to receive the extensive benefits (including wage protection for up to six years) prescribed in the ICC's

"*New York Dock*" employee protective conditions.² 366 I.C.C. at 230-31.

In 1986, as part of the ongoing process of consolidating their operational functions, NW and Southern decided to consolidate at one location the function of "distribution of power"—the assignment of locomotives to particular trains and facilities. Until then, power distribution on NW was performed in a facility in Roanoke, Virginia (the System Operations Center, or "SOC") by employees known as "SOC supervisors," who were represented by respondent American Train Dispatchers Association ("ATDA") and worked under a labor agreement to which the parties were NW and ATDA. In contrast, power distribution on Southern was performed in Atlanta, Georgia, by company officers—nonunion management employees known as Superintendents Transportation-Locomotive ("STLs").

The railroads proposed that power distribution for the entire Norfolk Southern system would now be performed by Southern at its Atlanta facility. Because this rearrangement was to be carried out under authority of the ICC's original *Norfolk Southern Control* decision, the railroads recognized that the *New York Dock* protective conditions would apply. Accordingly, as required by Art. I, § 4 of the protective conditions, the railroads notified ATDA of the proposal and offered to negotiate an "implementing agreement" to cover the transaction.³

² These conditions were adopted by the ICC in *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

³ Art. I, § 4 of the protective conditions requires the railroad

Negotiations failed. The railroads wanted Southern to continue to handle power distribution using STLs, and they proposed to offer all the NW SOC supervisors management jobs as Southern STLs. This would result in the employees' receiving substantial *increases* in wages and benefits, as well as the assurance of six years' wage protection under the *New York Dock* conditions. ATDA maintained, however, that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the SOC supervisors' labor agreement would not permit this result, and that the NW power distribution work could be moved to Atlanta only if it were performed there by NW's SOC supervisors working under the existing NW/ATDA labor agreement.

The railroads invoked arbitration under Art. I, § 4 of the protective conditions, and, following a hearing, the arbitrator issued an award in which he imposed an implementing agreement.⁴ He authorized the trans-

to give 90 days' written notice of a transaction that "may cause the dismissal or displacement of any employees, or rearrangement of forces," and, if requested, to negotiate an "agreement with respect to application of" the protective conditions to the transaction. The section also provides that "[e]ach transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." If the parties are unable to agree on the terms of this so-called "implementing agreement," either party may submit the dispute to binding arbitration. 360 I.C.C. at 85.

⁴ *Norfolk & Western Ry. and Southern Ry. and ATDA*, May 19, 1987 (Harris, Arb.). The arbitrator's award was reproduced

fer of work from Roanoke to Atlanta as proposed by the railroads. He also ruled that NW SOC supervisors who accepted STL positions with Southern could not carry their existing labor agreement with them to Atlanta but would become Southern officers. The implementing agreement he imposed provides, *inter alia*, that "[w]here rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply." J.A. 168.⁵

ATDA sought review of the award by the ICC.⁶ The ICC affirmed the award in all respects, holding, *inter alia*, that the arbitrator

correctly found . . . that the terms of [*Norfolk Southern Control*] and specifically the compulsory, binding arbitration required by Ar-

in the Joint Appendix ("J.A.") below at 139. Technically, the award was rendered by a three-person "committee" or "panel" established by agreement of the parties; the panel consisted of a neutral referee (the arbitrator), one member representing the railroads, and one member representing the union. For this reason, the ICC decision below refers to the award as the "panel's" decision. The railroad member of the panel concurred in the arbitrator's award and the union member dissented.

⁵ The transfer of power distribution work took place on June 6, 1987. Southern offered STL positions to all nine active and all three furloughed NW SOC supervisors, and nine of the total accepted and moved to Atlanta.

⁶ The ICC exercises the authority to review the awards of arbitrators acting under the employee protective conditions. *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). See *United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987) (arbitration award is not reviewable under RLA but is exclusively subject to review under Interstate Commerce Act), *cert. denied*, 484 U.S. 1006 (1988).

ticle I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved.

App. 35a (citations omitted). On the merits of the case, the ICC agreed with the arbitrator's decision not to impose the NW/ATDA labor agreement on work in the consolidated Atlanta office—relief sought by ATDA—finding that to impose that agreement "would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." App. 37a.

ATDA sought judicial review of the ICC's decision under 28 U.S.C. §§ 2321(a) and 2341 *et seq.*⁷ In the Court of Appeals, ATDA's principal contention was that the ICC exceeded its jurisdiction by upholding the arbitrator's authority to allow the transfer of work rather than remitting the parties to the RLA pro-

⁷ ATDA filed its petition for review in the United States Court of Appeals for the Eleventh Circuit. NW and Southern obtained leave to intervene in the review proceeding as of right, under 28 U.S.C. §§ 2323 and 2348 and Fed. R. App. P. 15(d). By order of September 15, 1988, the Eleventh Circuit transferred the case to the District of Columbia Circuit.

cedures for negotiating changes in agreements, 45 U.S.C. § 156.

In its July 25, 1989 decision covering this case and the companion *Brotherhood of Railway Carmen v. ICC*,⁸ the Court of Appeals analyzed the cases as presenting three primary questions relating to the reach of the ICC's power under the Interstate Commerce Act: (1) whether the § 11341(a) exemption "from all other law" permits the "override" of labor agreements; (2) whether that exemption permits the override of the RLA itself; and (3) whether the ICC has authority under 49 U.S.C. § 11347, the provision requiring imposition of employee protective conditions, to displace employees' RLA remedies. The court decided only the first question. It held that § 11341(a) "does not grant the ICC its claimed power to override provisions of a [collective bargaining agreement]," App. 26a, and reversed the ICC on this point.

The court declined to decide whether 49 U.S.C. § 11341(a) "may operate to override provisions of the RLA" itself, App. 19a, because, in light of its holding that § 11341(a) does not reach agreements, "it is unclear what are the consequences, if any, of [the ICC's] rulings that the carriers need not comply with the RLA," App. 23a, and because the ICC's holding on the point supposedly departed from prior ICC decisions without adequate explanation, App. 22a-23a. The court also declined to address the ICC decision's conclusion that the arbitration procedure in the *New York Dock* conditions, adopted under § 11347, displaces RLA-derived rights, because the ICC supposedly had not relied on this ground on appeal. App. 25a-26a.

⁸ See page ii, footnote 1, above.

The Court of Appeals remanded the case with respect to the issues it had not addressed "in order that the agency may determine whether further proceedings are necessary." App. 26a.⁹

NW and Southern petitioned for rehearing and filed a suggestion of rehearing *en banc*. The petition and suggestion were denied by orders issued on September 29, 1989. App. 49a, 51a.

The ICC also filed a document styled as a petition for rehearing. But the ICC did not ask the Court of Appeals to rehear the case immediately; rather, the ICC represented that it intended to conduct a proceeding on remand as directed by the court, and it asked the court "to refrain from ruling on this petition for rehearing until the Commission's decision on remand is published." ICC Pet. at 2. By order entered on September 29, 1989, the Court of Appeals directed "that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand." App. 54a. Also by separate orders entered on the same date, the Court of Appeals entered its judgment of remand, App. 47a, and amended its July 25, 1989 decision to specify that it was remanding only the "records" and not the "cases" to the ICC. App. 27a-28a. The effect of that amendment, under the court's local rule 15(c), was to make clear that the court retained jurisdiction over the matter and that it would not be necessary for a party aggrieved by

⁹ The Court of Appeals did not address objections ATDA had raised based on the Fifth Amendment and 45 U.S.C. § 152 Fourth.

the ICC's eventual decision on remand to file a new petition for review.¹⁰

REASONS FOR GRANTING THE WRIT

The Court of Appeals has misinterpreted the command of the Interstate Commerce Act, 49 U.S.C. § 11341(a), that a person participating in a transaction approved by the Interstate Commerce Commission is "exempt from the antitrust laws and from all other law . . . as necessary to let that person . . . carry out the transaction" The Court of Appeals has now held that the reach of the § 11341(a) exemption does not extend to claims asserted under labor agreements governed by the Railway Labor Act. That holding conflicts with *Schwabacher v. United States*, 334 U.S. 182 (1948); it is inconsistent with decisions rendered by other circuit courts since 1963; and it is contrary to the repeatedly expressed intent of Congress.

The provision under review, § 11341(a), is a cornerstone of the nation's longstanding policy of fostering railroad consolidations in the interest of economy and efficiency. The exemption provision originated in the Transportation Act of 1920;¹¹ was reenacted in the Emergency Railroad Transportation Act of 1933;¹² was reenacted again in the Transportation

¹⁰ The ICC is now in the process of conducting a proceeding on remand. Written comments have been solicited from the parties and interested persons, and oral argument is set for January 4, 1990.

¹¹ Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8) ("§ 5(8)").

¹² Emergency Railroad Transportation Act, ch. 91, § 202(15), 48 Stat. 211, 219, codified as 49 U.S.C. § 5(15) ("§ 5(15)").

Act of 1940;¹³ and was recodified in 1978, without substantive change,¹⁴ as § 11341(a). In each version, the operative language has been similar and the meaning has been the same: to immunize carriers from collateral legal challenges to the carrying out of ICC-approved transactions. The Court of Appeals' mistaken holding denies the past and condemns the railroad industry to a destabilized future.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *SCHWABACHER v. UNITED STATES* AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

1. The Court of Appeals erroneously held that the § 11341(a) exemption "from all other law" does not reach *contracts*. App. 12a, 18a. No party to this case made such an argument and the Court of Appeals embraced it without benefit of briefing or oral argument on the point. The Court of Appeals' holding is plainly contrary to *Schwabacher v. United States*, 334 U.S. 182 (1948).

Schwabacher held that former § 5(11) of the Interstate Commerce Act, the direct predecessor of § 11341(a), relieved carriers from private contractual obligations, to the extent necessary to carry out an ICC-approved transaction. 334 U.S. at 185-89, 194-95, 199-201. That holding forecloses the interpretation of § 11341(a) that the Court of Appeals has adopted.

¹³ Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 908, codified as 49 U.S.C. § 5(11) ("§ 5(11)").

¹⁴ Pub. L. 95-473, § 3(a), 92 Stat. 1466; *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 299 n.12 (Stevens, J., concurring).

Schwabacher was a challenge to an ICC order approving the merger of the Pere Marquette Railway Company with another carrier, brought by a group of dissenting Pere Marquette preferred stockholders. In the ICC approval proceeding, these stockholders claimed that under the Pere Marquette charter, which was enforceable under the laws of Michigan, they were entitled to receive at least \$172.50 per share of stock; and they objected to the proposed merger plan because it allocated them substantially less than this amount and thereby deprived them "of contract rights under Michigan law" 334 U.S. at 188. The ICC approved the proposed merger plan but left the stockholders to pursue their charter claims in state court. *Id.*

This Court, relying on, *inter alia*, § 5(11), rejected the ICC's approach and held that once the ICC approved the merger, the surviving carrier was relieved from any claims for additional payments based on rights assertedly conferred by the Pere Marquette charter. 334 U.S. at 194-95; 201-02.

Schwabacher contains many references to Michigan or state law, but, contrary to the Court of Appeals' view (App. 21a), the decision does not involve any state statute conferring a substantive right on the preferred stockholders. The references to state law relate to only two subjects: (1) the question whether, as a matter of Michigan law, a "winding up" of Pere Marquette was occurring, as it was this event that would trigger rights under the express terms of the charter; and (2) the availability of the state court system to hear and decide the claims asserted by the stockholders under their private contract with the

Pere Marquette.¹⁵ The sole source of the stockholders' claimed right to receive \$172.50 per share was the promise made in the charter, and it was this contractual promise that, by operation of § 5(11), was abrogated.¹⁶

Our understanding of *Schwabacher* is not new. The Court of Appeals itself has previously agreed with it. *Altman v. Central of Georgia Ry.*, 488 F.2d 1302 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under the terms of a railroad's charter and bylaws are barred). *See also Snow v. Dixon*, 362

¹⁵ The Michigan merger statute provided that "the debts, liabilities and duties" of the merged companies "shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it." Michigan Statutes Annotated, § 22.234, quoted in *Schwabacher*, Brief for Appellants at 9.

¹⁶ In its decision approving the Pere Marquette merger, the ICC had concluded that "[w]hether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette, is a question not within our province to decide." *Pere Marquette Railway Merger, Etc.*, 267 I.C.C. 207, 248 (1947) (citation omitted). In this Court, the ICC framed the question presented as:

Whether, in passing upon the agreement of merger here involved, . . . the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2-13), and Section 20a (1-11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising under State law, of dissenting stockholders as a separate and distinct class

Schwabacher, Brief for Appellee ICC at 2. *See also* Brief for Appellants at 2; Reply Brief for Appellants at 2.

N.E.2d 1052 (Ill.), *cert. denied*, 434 U.S. 939 (1977); *St. Louis Southwestern Ry. v. City of Tyler*, 422 S.W.2d 780 (Tex. Civ. App. 1967). Since *Schwabacher*, the ICC itself has long asserted its authority to override contractual obligations.¹⁷

The interpretation of the reach of the exemption "from all other law" adopted in *Schwabacher* certainly applies here. In *Schwabacher*, the Court held that the ICC had exclusive authority to determine the rights of stockholders notwithstanding the provisions of their private contract with the corporation, and that the ICC decisionmaking process supplanted state court remedies otherwise available to those stockholders. Here, the contracts in question are creatures of the RLA and have no meaning apart from the rights and obligations the RLA bestows; the RLA prescribes the procedures for creating agreements and the exclusive

¹⁷ E.g., *Missouri Pacific R.R.—Merger—Texas & Pacific Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd on other grounds sub nom. City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) (assuming *arguendo* that ICC has authority to abrogate contracts, but concluding that ICC's exercise of this power in the circumstances was incorrect), *cert. denied*, 435 U.S. 950 (1978); *St. Louis Southwestern Ry. Lease*, 290 I.C.C. 205, 211-13 (1953).

The Court of Appeals incorrectly suggested, App. 13a, that in *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311 (1952), the ICC disclaimed authority, under 49 U.S.C. § 5(11), the predecessor of § 11341(a), to abrogate contracts. The decision was precisely to the contrary. *Gulf, Mobile* was an abandonment case; § 5(11) (like today's § 11341(a)) applied to mergers and consolidations, not abandonments. The ICC held that it could not abrogate contracts in abandonment cases because it could do so "only upon a clear grant of statutory authority similar to that contained in section 5(11)." 282 I.C.C. at 335.

means of enforcing them.¹⁸ Because the statutory exemption "from all other law" applies to purely private contracts, it surely applies to contracts that are themselves constructs of federal law.¹⁹

Justices Stevens, Brennan, Marshall, and Blackmun, concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring) ("*ICC v. BLE*"), have already agreed that the power to modify or override labor agreements is encompassed in the § 11341(a) exemption. In *ICC v. BLE*, as here, what was at stake was the claim of certain employees that the "Railway Labor Act . . . and their collective bargaining agreements" gave them the right to perform certain work. 482 U.S. at 295 (Stevens, J., concurring). The concurring Justices would have rejected that claim because of the § 11341(a) exemption.²⁰

¹⁸ *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (railroad labor agreements are not enforceable in state court); *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 156 (1969) (RLA, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements"); *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 576-78 (1971) (obligation to "maintain" agreements is founded on RLA); *California v. Taylor*, 353 U.S. 553, 561 (1957) (railroad labor agreements supersede state law).

¹⁹ The Court of Appeals did not think "contracts" were encompassed by the phrase "all other law," App. 12a, and went on to express concern that if the ICC's reading of § 11341(a) were correct, the ICC "could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors," App. 13a. In fact, there has been no doubt since 1948 that the ICC does have precisely that power, within the other confines of § 11341(a).

²⁰ In *ICC v. BLE*, a majority of a panel of the District of

2. The holding of the Court of Appeals breaks with a uniform line of circuit court decisions, beginning with *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'd* 202 F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) ("*BLE v. C&NW*"), which have concluded that the exemptive provision now found in § 11341(a) reaches all rights derived from the RLA, including the right to assert claims based on labor agreements.

In *BLE v. C&NW*, the Eighth Circuit decided, in direct contradiction to the Court of Appeals here, that former § 5(11) exempted a railroad carrying out an ICC-approved transaction from the assertion against it of rights claimed under the RLA, including rights based on collective bargaining agreements. 314 F.2d at 426, 431-33.²¹ *Accord Missouri Pacific R.R. v.*

Columbia Circuit had remanded the case to the ICC, directing the agency to make specific findings as to the necessity of an override of RLA-derived rights, including rights assertedly based on labor agreements, in the particular case. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985). This Court vacated the Court of Appeals' decision on the ground that the appeal of the ICC decision had been untimely and that the Court of Appeals accordingly lacked jurisdiction. The four concurring Justices would have reached the merits of the case; citing *Schwabacher* for its holding that the statutory exemption "from all other law" is self-executing, they concluded that § 11341(a) does not require specific findings as to the necessity of an override of RLA rights, including rights claimed to arise under labor contracts. 482 U.S. at 298. *See also, e.g., Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 109, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

²¹ In *BLE v. C&NW*, the union had argued that § 5(11) "only purports to relieve the railroad of 'restraints' or 'limitations' or 'prohibitions' of law and does not purport to relieve the railroad

United Transportation Union, 782 F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987). All the other circuits to have considered the issue have followed *BLE v. C&NW* in similarly concluding that rights asserted under the RLA are subordinate to the Interstate Commerce Act's exemptive provision. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (*per curiam*), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845-46 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In so deciding, none of these courts distinguished between rights claimed under the RLA and those claimed under labor agreements enforceable through that statute. To the contrary, the courts treated these RLA-derived rights as of a piece, never doubting that the exemption "from all other law" immunizes a railroad against all RLA-based challenges to the carrying out of an ICC-approved transaction.²²

of its contractual obligations"—there, the railroad's asserted obligation to respect seniority rights arising by virtue of certain labor contracts. 202 F. Supp. at 283. The district court, relying, *inter alia*, on *Schwabacher*, rejected the union's arguments. 202 F. Supp. at 284. The Eighth Circuit, though not mentioning *Schwabacher* explicitly, affirmed the district court in all respects. As the Eighth Circuit explained, to hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." 314 F.2d at 431-32.

²² The circuit courts have reached similar results in cases arising in the airline industry, which is subject to the RLA, even

The ICC has itself long shared in this settled judicial understanding of the reach of the § 11341(a) exemption.²³

though the statutory scheme governing consolidations in that industry did not contain an exemption provision comparable to § 11341(a). Every court to consider the question held that the RLA, and labor agreements entered into under it, must yield to the Civil Aeronautics Board's authorization of a transaction, subject to employee protective conditions. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), cert. denied, 429 U.S. 961 (1976); *International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), cert. denied, 409 U.S. 845 (1972); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896-97 (2d Cir. 1971), cert. denied, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.) ("[a] private [labor] contract must yield to the paramount power of the [CAB] to perform its duties under the statute creating it to approve mergers . . ."), cert. denied, 346 U.S. 826 (1953).

²³ E.g., *Denver & Rio Grande Western R.R.—Trackage Rights—Missouri Pacific R.R.*, Finance Docket No. 30,000 (Sub-No. 18), decision served October 25, 1983, slip op. at 6 ("[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction") ("*DRGW*"), appeal dismissed sub nom. *ICC v. BLE*, 482 U.S. 270 (1987); see *Norfolk & Western Ry.—Merger*, 347 I.C.C. 506 (1974).

The Court of Appeals' decision to remand the question whether § 11341(a) extends to rights asserted under the RLA for further explanation is premised on a misreading of the ICC's precedents. The Court of Appeals mistakenly thought (App. 22a) that the ICC first took the position that § 11341(a) applies to the RLA in 1983, in *DRGW*, and that this position deviated without explanation from the position the ICC had adopted in 1967 in *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967) ("*Southern Control*"). But neither point is true. The ICC stated unequivocally in 1974 that "[t]he Railway Labor Act is

The result first reached by the Eighth Circuit, and unquestioned until now, is exactly the one contemplated fifty years ago by this Court in *United States v. Lowden*, 308 U.S. 225 (1939). *Lowden* upheld the ICC's implicit authority to impose labor protection, prior to enactment of the first statutory requirement for such protection, precisely because the Court recognized that the carrying out of a transaction under authority of the Interstate Commerce Act can result in employees' losing rights they previously held under existing labor agreements. 308 U.S. at 233.²⁴

a Federal act and is thereby preempted by section 5(11) [now § 11341(a)]." *Norfolk & Western Ry.—Merger*, 347 I.C.C. at 511. Moreover, the Court of Appeals' reading of *Southern Control* ignores that the whole point of that decision was to explain that employees could not invoke RLA rights in connection with the carrying out of an approved transaction. 331 I.C.C. at 162-64, 171.

In a decision issued just after the Court of Appeals' decision in this case, the ICC professed to accept the Court of Appeals' instruction that the § 11341(a) exemption does not reach labor agreements. *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), appeal docketed, No. 89-1503 (D.C. Cir. Aug. 21, 1989). Because the Court of Appeals was wrong, the ICC's acquiescence in its holding has no force.

²⁴ As the *Lowden* Court explained, protective arrangements were justified in significant part because railroad consolidations necessarily result in the abridgment of contract rights:

[T]he Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their oper-

Moreover, the conclusion that § 11341(a) extends to all RLA-derived rights is precisely the one Congress intended. The legislative record makes it clear that Congress has always understood that the Interstate Commerce Act's exemption provision will cause both the RLA and agreements negotiated under that statute to yield to the carrying out of an approved transaction. In our case, the Court of Appeals thought there was no pertinent legislative history of the Interstate Commerce Act after the Transportation Act of 1920, where the exemption provision originated, and mistakenly ended its analysis with that Act. App. 18a-19a.²⁵ In fact, developments since the 1920 Act provide conclusive evidence that Congress expected the exemption provision to reach labor agreements.

The Emergency Railroad Transportation Act of 1933 ("ERTA") is perhaps most revealing. Title I of

ation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation

....

308 U.S. at 233 (footnote omitted).

²⁵ The Court of Appeals was clearly wrong in proceeding (App. 17a-18a) as though § 11341(a) is cabined by the particular circumstances that Congress confronted in 1920. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 78-79 (1944) (expansive language of § 5(11) refutes contention that, because motor carriers faced less severe economic circumstances in 1935 than did railroads in 1920, scope of § 5(11) is narrower for motor carriers than for railroads).

ERTA was *temporary* legislation of ultimately three years duration. Responding to the extraordinary circumstances created by the Depression, Congress expressly excluded the RLA and labor agreements from the exemption provision found in Title I.²⁶ At the same time, Congress did *not* carve out a special exception for the RLA or labor agreements from the exemption provision contained in the *permanent* Title II of ERTA, which was codified as 49 U.S.C. § 5(15), a forerunner of § 11341(a). Differences between Title I and Title II of ERTA "indicate an intentional distinction." *Texas v. United States*, 292 U.S. 522, 534 (1934) (contrasting unqualified exemption provision in § 5(15) of Title II with provision in Title I expressly guaranteeing that carriers would not be relieved from contractual agreements to keep offices in particular locations).

Congress reaffirmed its purpose in the Transportation Act of 1940, reenacting the exemption provision (as 49 U.S.C. § 5(11)) without any exception for the RLA or labor agreements.²⁷ Section 5(11) was

²⁶ Section 10(a) of ERTA Title I contained an exemption from other law similar to that found in the Transportation Act of 1920 (then 49 U.S.C. § 5(8)), to which Congress added the following:

nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

48 Stat. at 215. Plainly, there would have been no need for this specific limitation if the exemption provision, by its terms, did not reach RLA-derived rights in the first place.

²⁷ The 1940 Act also provided "additional proof" of Congress'

recodified in 1978 as § 11341(a), without substantive change.

A similar purpose is found in the legislative history of the employee protective conditions—in particular, in Congress' rejection, in enacting the predecessor to 49 U.S.C. § 11347 as part of the Transportation Act of 1940, of a proposal known as the Harrington amendment. That proposal would have permitted consolidations to occur only if all rights under the RLA and labor agreements were preserved; it "threatened to prevent all consolidations." *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950).²⁸ As the Eighth Circuit recognized in *BLE v. C&NW*, to exclude RLA-derived rights from the reach of the § 11341(a) exemption would produce the

intent to grant the ICC an adequate immunity power, by making the ICC's jurisdiction over transactions "exclusive and plenary." *Seaboard Airline R.R. v. Daniel*, 333 U.S. 118, 125 (1948).

²⁸ The Harrington amendment would have barred the ICC from approving any transaction that would "result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939) (emphasis added). Instead, Congress enacted what became 49 U.S.C. § 5(2)(f), the predecessor to § 11347, requiring the ICC, in approving a transaction, to provide a "fair and equitable arrangement to protect the interests of the [affected] employees." The defeat of the Harrington amendment confirmed Congress' intent to permit railroads to carry out approved transactions that cause changes in existing labor agreements, but to ensure that affected employees receive fair compensation under the ICC's protective conditions. See *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 147-54 (1950); *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 42 (1971).

very result Congress rejected in defeating the Harrington amendment. 314 F.2d at 430-31.²⁹

The crabbed reading of § 11341(a) adopted by the Court of Appeals wrongly and inexplicably leaves transactions approved by the ICC vulnerable to defeat

²⁹ Here, the Court of Appeals not only ignored dispositive legislative history, but misunderstood the legislative history it did review. Thus, the court mistakenly relied on Congress' rejection, in 1926, of a proposed amendment to the bill *that became the RLA* that would have permitted the ICC to suspend wage agreements it believed were not in the public interest.

The Court of Appeals found in language quoted from a 1926 Senate Report—"there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached"—specific evidence of congressional hostility to ICC interference with negotiated wage agreements. App. 18a. But the quoted passage in fact did not address the proposed amendment to the RLA bill. The "agreement" to which the Senate Report referred was not a negotiated wage agreement (or such agreements in general), but, rather, the overall agreement between management and labor *as to what the RLA as a whole should say*. The quoted passage simply affirmed that the new RLA should ratify, and not change the terms of, the national legislative compact between management and labor. S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), reprinted in 1 *Railway Labor Act of 1926, Legislative History* at 100, 105 (M. Campbell & E. Brewer, III, eds. 1988).

What the Senate Report actually said about the proposed amendment to the RLA bill was that it would embroil the ICC in a "field of controversy" and thereby impair the ICC's effectiveness. *Id.* In any event, the proposed amendment was *not* related to the ICC's jurisdiction over transactions, but would have given the ICC a roving commission to suspend wage agreements generally. The amendment's rejection provides no evidence that Congress intended (either prior to or after 1926) to withhold from the ICC the authority to change labor agreements when necessary to the carrying out of an approved transaction.

through the assertion of RLA-derived rights, in direct disregard of clear legislative intent and what, until now, has been the uniform understanding of the courts.

3. This Court should review and reverse the decision of the Court of Appeals now, without awaiting the results of the ICC remand proceeding and further action by the Court of Appeals. The holding of the Court of Appeals is self-contained and plainly wrong. It is already having an enormous adverse impact on the railroad industry.

The decision's erroneous holding as to the reach of the § 11341(a) exemption is reverberating through the courts of appeals. Another panel of the Court of Appeals has cited the holding as a proper statement of the law. *Railway Labor Executives' Association v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989).³⁰ Moreover, notwithstanding its own prior decisions holding that the § 11341(a) exemption applies to RLA-derived rights, including the right to assert claims based on labor agreements, the Eighth Circuit has relied on the Court of Appeals' decision as authority for the proposition that the ICC lacks the power to override the provisions of a labor agreement. *Brotherhood of Locomotive Engineers v. ICC*, 885 F.2d 446, 449-50 (8th Cir. 1989).

This Court's eventual consideration of the Court of Appeals' July 25, 1989 decision will not be assisted by the outcome of the remand proceeding that is now in progress at the ICC. That proceeding, limited by the "law of the case" established by the Court of

³⁰ Under 28 U.S.C. § 2343, all ICC decisions may be reviewed in the District of Columbia Circuit.

Appeals, offers at best the promise that the ICC will articulate an artificially narrow conception of its Interstate Commerce Act powers. Although the ICC can support its actions in our case without relying on the § 11341(a) exemption as the source of authority to override agreements, it defies history, the uniform case law, and decades of clear congressional intent for the agency to have to do so; and the analysis that the ICC must necessarily put forth in order to do so will be incomplete. Moreover, this Court will not benefit from the Court of Appeals' own review of the ICC's remand decision, as that review will necessarily be conducted on a foundation consisting of the court's already-established erroneous reading of § 11341(a).³¹

The ICC itself has acquiesced in the Court of Appeals' § 11341(a) holding and is handling other cases under the cloud of that acquiescence. See pages 18-19, n.23, above. If this Court does not reverse the Court of Appeals now, the ICC will continue to impose an incorrect, restrictive limitation on the reach of its own power. Parties to pending and future railroad transactions will be forced to make innumerable business decisions shaped by the knowledge that the ICC is applying the incorrect rule. This problem is severe; to the extent that the Court of Appeals' decision dictates unquestioned adherence to existing labor agreements, it threatens to prevent future railroad consolidations, in violation of the national transpor-

³¹ This point is brought home by the Court of Appeals' own suggestion that its holding as to the reach of the § 11341(a) exemption may leave little for the ICC to consider on remand. App. 23a-25a.

tation policy and in derogation of the proper adjudicative role of the ICC.

Finally, the Court of Appeals' decision destabilizes ordinary day-to-day dealings between labor and management in the railroad industry. As happened in this case, railroads frequently conduct coordinations of work under authority of decisions previously rendered in ICC merger and control proceedings, subject to the protective conditions already imposed by the ICC in those proceedings; in connection with such coordinations, the railroads negotiate (and, when necessary, arbitrate) implementing agreements with their unions on an ongoing basis, without returning to the ICC at all unless an arbitration award is appealed. Because the Court of Appeals' decision rejects the settled understanding of the working and effect of the ICC approval process, it promises to stifle the continuing implementation of already-approved railroad consolidations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 28, 1989

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 1989

Decided July 25, 1989

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

CSX TRANSPORTATION, INC., INTERVENOR

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY Co. and
SOUTHERN RAILWAY Co., INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

William G. Mahoney, with whom John O'B. Clarke, Jr. was on the brief, for petitioners.

John J. McCarthy, Jr., General Counsel, Interstate Commerce Commission, with whom Robert S. Burk, General Counsel, and Henri F. Rush, Deputy General Counsel, Interstate Commerce Commission, were on the brief, for respondent. Robert J. Wiggers and John J. Powers, III, Attorneys, Department of Justice, also entered appearances for respondent.

James S. Whitehead, for intervenor in No. 88-1724.

Jeffrey S. Berlin, with whom Mark E. Martin, Amy R. Doberman and William P. Stallsmith, Jr., were on the brief, for intervenors in No. 88-1694.

Before: WALD, Chief Judge, and EDWARDS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge D.H. GINSBURG.

D.H. GINSBURG, Circuit Judge: The Brotherhood of Railway Carmen and the American Train Dispatchers' Association petition for review of orders of the Interstate Commerce Commission issued in separate proceedings before that agency. We dispose of the two cases together because they raise common issues with respect to the ICC's authority to exempt a party to a merger between railway carriers subject to approval under § 11344 of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (the Act), from the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Because we conclude that the ICC has misperceived, in one important respect, the scope of its exemptive power, we grant each petition for review in part, and remand the cases to the ICC for further proceedings.

I. FACTUAL BACKGROUND

The operative facts of the two transactions here at issue, and the background of the respective administrative proceedings, are as follows:

A. *The Carmen's Case*

In 1980, the ICC approved a proposal under which CSX Corporation, a newly-formed holding company, would acquire control of two other holding companies: (1) the Chessie System, Inc., the principal railroad subsidiaries of which were the Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (Seaboard) (later to become CSX Transportation, Inc., or CSX). *CSX Corporation—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*).

In its order approving the transaction, the ICC imposed upon the parties a standard set of labor-protective conditions, as required by § 11347 of the Act, 49 U.S.C. § 11347. *CSX Control*, 363 I.C.C. at 588-92, 604. As usual in merger cases, the applicable conditions were transplanted from the ICC's decision in *New York Dock*, 360 I.C.C. 60, 84-90 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Section 4 of the *New York Dock* conditions establishes procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, § 4 requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice" Section 2 is a status quo provision:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and

benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements.

In 1986, CSX, invoking § 4 of the *New York Dock* conditions, notified the labor organizations representing its employees that it intended to close its freight car repair shop at Waycross, Georgia, and to transfer the work performed there to the C&O repair shop at Raceland, Kentucky, and that the transfer would result in a net decrease in available jobs at the two shops. The Brotherhood then attempted, on behalf of certain CSX employees who would be affected by the transfer, to negotiate an agreement governing the labor-related changes that the Waycross-Raceland consolidation would require.

Relations between the Brotherhood (and other unions) and CSX were governed by a CBA—known as the “Orange Book”—that they had negotiated in connection with the 1967 merger that created Seaboard; CSX and the Brotherhood continued to observe these terms after the 1980 *CSX Control* transaction. The Orange Book provides, with exceptions not here relevant, that the carrier will employ each covered employee for the remainder of his working life, and that no covered employee “shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.” In consideration for this job protection, the Orange Book gives the carrier the right “to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [i.e., Seaboard] system”

The negotiations between CSX and the Brotherhood failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in

working conditions, and, if so, (b) CSX would be required to comply with the terms of § 6 of the RLA, 45 U.S.C. § 156, and thus to bargain before effecting the change. The Brotherhood then invoked the mandatory arbitration provision of the *New York Dock* conditions, but shortly thereafter, reversed its position and claimed that because the shop consolidation was not contemplated by the *CSX Control* transaction, the *New York Dock* conditions were not applicable at all. By then, however, CSX had invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel (the *Carmen* Committee), with the Brotherhood participating under protest.

In the proceedings before the Committee, it became clear that CSX sought not only to transfer work from Waycross to Raceland and to reduce the total number of positions, but also (1) to transfer certain Waycross employees to employment by the C&O in Raceland and (2) to remove them from the protection of the Orange Book to coverage under the CBA between the C&O and the Union, which apparently does not contain a lifetime income clause. The Committee held that the Orange Book prohibited CSX from transferring either work or employees outside the Seaboard system created by the 1967 merger. The ICC did not pass upon that determination, but CSX, which has intervened in this appeal, does not dispute it.

The Committee then held, however, that (1) it had the power, “[a]s a quasi-judicial extension of the ICC” to abrogate provisions of a CBA, and to relieve CSX from any requirement of the RLA, that stood in the way of an operational change, such as the shop transfer, that was “authorized or required” by—though not specifically referenced in—the *CSX Control* decision approving the 1980 merger; and (2) it would (a) abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, outside the old Seaboard system,

and (b) exempt CSX from the RLA insofar as it might require the carrier to bargain before unilaterally changing the Orange Book with respect to the work transfer.

The ICC upheld the Committee in other respects, but reversed the Committee's decision not to abrogate the Orange Book prohibition on the transfer of employees as well as work. The ICC further held that, to the extent that switching CSX employees from the Orange Book to the CBA at Raceland would deprive them of their right to income for life, that right would be abrogated. It did not pass upon the question whether the Orange Book did in fact prohibit the transfer of either work or employees but assumed as much.

In its petition for review, the Brotherhood challenges the ICC's authority under the Act to override provisions of the Orange Book and of the RLA. It also claims that the ICC's decision, insofar as it overrides the Orange Book, violates the Compensation Clause of the Fifth Amendment to the Constitution. Finally, it challenges the standard of review that the ICC applied in reversing the Committee's ruling against employee transfers.

B. *The Dispatchers' Case*

In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two previously separate carriers—the Norfolk and Western Railway Company (N&W) and the Southern Railway Company (Southern). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co.*, 366 I.C.C. 173 (1982) (*NS Control*). As in *The Carmen's Case*, the ICC imposed upon the parties to the transaction the standard *New York Dock* conditions. *Id.* at 231.

The American Train Dispatchers' Association was the bargaining representative of certain N&W employees responsible for power distribution. In September 1986,

N&W and Southern informed the Association that they intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia," and in so doing, to abolish several supervisory positions at Roanoke. The carriers proposed an implementing agreement whereby the affected N&W supervisors would be "given consideration" for employment in new positions as Superintendents in Atlanta. Superintendents there were considered management employees, however, and were not covered by any CBA.

Attempts to negotiate an implementing agreement foundered over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the CBA with N&W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to the *New York Dock* conditions. As in *The Carmen's Case*, the dispute came before a three-member arbitration committee (the *Dispatchers' Committee*), which ruled in favor of the carriers on each of the disputed issues.

The rationale of the *Dispatchers' Committee* with respect to the CBA and the RLA was essentially the same as that of the *Carmen Committee*. It concluded that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the N&W and the Southern; (2) the transfer of distribution functions, though not specifically considered in the *NS Control* case, was part of the control transaction; and (3) apparently because application of the N&W CBA to Superintendents at Southern would impede the transfer, transferred employees could not retain their rights under that CBA.

On June 6, 1987, after the ICC had denied the Association's application for a stay of the Committee's award, the carriers effected the work transfer authorized thereby. On June 10, 1988, the ICC affirmed the Committee in all respects, stating, in particular, that the Committee's third ruling was supported by the record insofar as "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." The ICC also rejected the Association's claim that the transfer would deprive the employees of their right to representation under Section 2, *Fourth* of the RLA, reasoning that "[the Association's] rights as an incumbent bargaining representative are for determination by the National Mediation Board."

In its petition for review, the Association maintains that the ICC lacks authority under the Act to relieve the carrier of its obligation under the RLA and its CBA, and that its decision depriving the employees of their rights under the CBA violates the Compensation Clause of the Fifth Amendment.

II. LEGAL BACKGROUND

Before taking up the merits of this dispute, we discuss briefly the relevant statutory framework, the agency's position below, and its claim to *Chevron* deference for that position in this court.

A. Statutory Background

Sections 11341 and 11344 of the Act require that the parties to certain transactions listed in § 11343, including carriers proposing to merge, first get ICC approval. 49 U.S.C. §§ 11341, 11343, 11344(a), (c). Under § 11344(c), the ICC must approve any such proposal "when it finds the transaction is consistent with the public interest." As noted earlier, § 11347 requires that

it also impose upon the merging carriers certain labor protective conditions; and it generally meets this requirement by imposing the *New York Dock* conditions described above.

Section 11341(a) provides that upon ICC approval of a § 11343 transaction:

A carrier . . . participating in that approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). This is the so-called immunity provision at the center of this case.

B. The Agency's Position

In its decisions in these cases, the ICC asserted that it has the power, which devolves upon an arbitration committee convened under § 4 of the *New York Dock* conditions, to relieve a party to a § 11343 transaction from any provision of a CBA or of the RLA that stands in the way of implementing that transaction. Its rationale for this assertion was less than clear, however, due largely to its failure to analyze separately the statutory provisions upon which it relied and their relation to the specific rights it purported to abrogate.

1. Collective Bargaining Agreements

The ICC appears to have relied upon two bases for its claim that it may abrogate the provisions of a CBA. First, it cited the immunity provision, § 11341(a), stating that it empowered an arbitrator appointed under the *New York Dock* conditions "to override existing agreements by requiring the work and employees to be moved" *Carmen*, Joint Appendix (J.A.) 204; *id.*

at 207 (Committee correctly understood ICC's view to be that § 11341(a) overcomes "all legal obstacles preventing implementation" of an approved § 11343 transaction); accord *Dispatchers*, J.A. 290-91. As both Committees noted, the ICC had come to this position only recently, in *Denver and Rio Grande Western R.R. Co.—Trackage Rights—Missouri Pacific R.R. Co.*, Finance Docket 30,000, served Oct. 25, 1983 (DRGW), rev'd sub nom *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), rev'd on other grounds, 482 U.S. 270 (1987). Cf. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 170 (1967) (immunity provision does not relieve carrier from CBA limitation on transfer of employees).

In *The Carmen's Case*, the ICC appeared also to rely upon § 4 of the *New York Dock* conditions, which it read as supporting the Committee's ruling that it had "the absolute authority . . . to effect changes in work and employee assignments," notwithstanding any CBA provision to the contrary. J.A. 207.

The ICC renews each of these theories on appeal.

2. *The Railway Labor Act*

The ICC also appears to have advanced two sources for its power to override the RLA. First, it stated that the immunity provision exempts the parties to an approved § 11343 transaction from any RLA procedure that might impede the effectuation of the transaction. *Carmen*, J.A. 204-05, 207 (recounting, and apparently approving, the Committee's conclusion "that, under the immunity provisions of [§] 11341(a), implementation of transactions that we authorize under [§] 11343, such as *CSX Control*, supersede employee protections under the RLA"); accord *Dispatchers*, J.A. 290. The ICC had reached similar conclusions in *DRGW*, *supra*, and in *Union Pacific Corp.—Union Pacific R.R. Co. and Missouri Pacific R.R. Co.—Control—Missouri-Kansas-Texas R.R. Co., et al.*,

4 I.C.C. 2d 409, 514 (1988), a petition for review of which is currently pending before this court, see *Railway Labor Executives Ass'n v. ICC*, No. 88-1391 (argued April 28, 1989).

Second, the ICC stated that "[t]he mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission" *Dispatchers* J.A. 289; accord *Carmen*, J.A. 204. As we read it, the ICC's position was that when Congress enacted the current version of § 11347, which incorporates by reference a set of dispute resolution procedures culminating in mandatory arbitration, it intended those procedures to be exclusive where they applied. Although it nowhere expressly abandons this theory, the ICC does not argue it in this court; it relies solely upon its § 11341(a) theory.

C. *Chevron Deference*

The ICC argues that its interpretation of the relevant provisions of the Act is entitled to deference under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and that we should therefore uphold that interpretation as long as it is reasonable. We agree that *Chevron* applies to the ICC's reading of the statute that it is charged with implementing. *Chevron* establishes, however, two steps for judicial review of an agency's interpretation of law: we do not proceed to the question whether the agency's interpretation is permissible, and thus entitled to deference, unless we have first determined, based upon the language of the statute and the "traditional tools of statutory construction," *id.* at 843 n.9, that Congress has not "directly spoken to the precise question at issue . . . ; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We strike out first in search of

Congress's intent in enacting the immunity provision of the Act.

III. ANALYSIS

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). We begin, as always, with the relevant portion of the statute (§ 11341(a)):

... A carrier or corporation participating in or resulting from a transaction approval by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is *exempt from the antitrust laws and from all other law, including State and municipal law*, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

A. Collective Bargaining Agreements

We cannot sustain the ICC's position that this provision empowers it to override a CBA. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from "the antitrust laws and from all other law" to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs. Nor has the ICC explained how we can read the term "other law," as it has done, to mean "all legal obstacles." *Dispatchers*, J.A. 207. None of the Supreme Court decisions, discussed

below, authorizing the ICC to abrogate an "other law" even suggests that the term means "all legal obstacles." The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. See *Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952) ("None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.").

Moreover, the ICC's proposed insertion of "all legal obstacles" into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. Cf. *Gulf, Mobile & Ohio*, 282 I.C.C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its "contractual obligations for the payment of rent"). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act.

Perhaps we could tolerate the ICC's reading if it found strong support in either the "design of the statute as a whole," *K Mart*, 108 S.Ct. at 1817, or in its legislative history. We find nothing there upon which to sustain it, however; if anything, both tend to support the meaning conveyed by the words of the statute itself.

Congress first introduced the immunity provision, in a somewhat different form, in 1920. Transportation Act, 1920, 66th Cong., 41 Stat. 456, 482 (1920) (amending § 5 of the Act) (1920 Act) § 407. In the 1920 Act,

Congress deputized the ICC to design a master plan to consolidate the nation's railroads into a limited number of strong systems; the plan was to be implemented by voluntary action on the part of the carriers. 41 Stat. 481 (§§ 5(4), 5(6), *See generally Schwabacher v. United States*, 334 U.S. 182, 191-93 (1948)). It also, for the first time, gave the ICC exclusive jurisdiction to approve railroad consolidations; the agency was directed to approve any proposed consolidation that it found to be consistent with (1) its master plan; and (2) the public interest. (Congress removed the first criterion when, in 1940, it discarded the idea of a master plan. *See id.* at 193.)

The immunity provision of the 1920 Act provided that:

The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," . . . and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

41 Stat. 482 (§ 5(8) (emphasis added)).

It is reasonably clear from the history of the 1920 Act what Congress intended the immunity provision to accomplish. In 1917, President Wilson, in the exercise of his wartime powers, had taken possession of the railroads, in part to consolidate them into a unified transportation system in aid of the national defense. *See* Priorities Act, 65th Cong., 40 Stat. 272 (1917); Federal Control Act, 65th Cong., 40 Stat. 451 (1918). *See generally 32d Annual Report of the Interstate Commerce Commission* (1918) (1918 Annual Report) at 1-2. Prior to that time, the ICC's authority over the railroads was relatively limited; the States, on the other hand—through

their ratemaking commissions, their corporation laws, and their police powers—intensively regulated the carriers' rates, finances, and operations. Whereas state regulation had at first severely hampered efforts to enlist the railroads in the war efforts, *Schwabacher*, 334 U.S. at 191, during the period of nationalization, neither state nor federal law stood in the way of the Government's purpose to further the war effort.

In 1920, when the period of federal control was about to end, Congress thought it imperative to the transportation needs of the nation that a program of coordination and consolidation be continued; this it chose to pursue, in part, by facilitating voluntary consolidations in accordance with the master plan the ICC was to develop. *Id.* at 191-94. *See* H. Rep. No. 456, 66th Cong. at 6-7, 18-19 (1919); H. Rep. No. 650, 66th Cong. at 643-64 (1920). *See generally* I.L. Sharfman, *The Interstate Commerce Commission* 153-70, 183 (1931). The carriers' return to private ownership, however, would bring with it two complications.

First, they would be again subject to regulation by the uncoordinated and often unfriendly state commissions and legislatures. As the Supreme Court stated in *Transit Commission v. United States*, 289 U.S. 121, 127 (1933):

. . . Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

See also Texas v. United States, 292 U.S. 522, 530-31, 534-35 (1933) (in order "to insure an adequate transportation system" Congress gave the ICC power "to au-

thorize consolidations, purchases, leases, operating contracts, and acquisition of control," to the exclusion of state laws that would burden the ICC's master plan).

Second, they would be newly subject to regulation by the recently invigorated antitrust laws of the federal Government itself; the Supreme Court had recently held that § 1 of the Sherman Act made unlawful any merger between carriers that eliminated competition to even a limited extent. See *United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 88-89 (1912).

Congress addressed both of these problems with the immunity provision of the 1920 Act. First, Congress placed in the ICC, and removed from the antitrust courts, the duty of considering the anticompetitive effects of any merger proposed to it. 41 Stat. 481 (§ 5(4)) (ICC master plan to preserve competition "as fully as possible"); *McLean Trucking Co. v. United States*, 321 U.S. 67, 73-78 (1944). Second, Congress continued its wartime policy to centralize supervision of the nation's railroads and to eliminate conflicting state authority; thus, for example, ICC-approved consolidations could go forward, aided by the immunity provision, free of interference by the States. This general, centralizing sentiment was echoed in other sections of the 1920 Act, which gave the ICC authority, notwithstanding contrary state law, to (1) approve any extension, construction, or abandonment of tracks, see 41 Stat. 477-78 (§§ 1(18), 1(20)); *Transit Commission*, 289 U.S. at 126-28; (2) reject or permit any proposed issuance of securities, 41 Stat. 494-95 (§§ 20a(2), 20a(7)); and (3) adjust rates it deemed unduly preferential or discriminatory, *id.* at 484 (§ 13(4)).

The ICC applied the immunity provision of the 1920 Act to exempt merging carriers from a wide variety of state law impediments. See, e.g., *Clinchfield Ry. Lease*, 90 I.C.C. 113, 134 (1924) (constitutional bar to foreign

corporation operating railroad in state); *Control and Operation of Louisiana & Arkansas Ry. Co.*, 150 I.C.C. 477, 487 (1929) (law forbidding consolidation, stock ownership, or lease of parallel or competing lines); *Control of San Antonio & Arkansas Pass Ry. by Southern Pacific Co.*, 94 I.C.C. 701, 704 (1925) (local corporate headquarters requirement); *Lease of Louisville, Henderson & St. Louis Ry. by Louisville & Nashville R.R. Co.*, 150 I.C.C. 741, 743-44 (1929) (law giving minority stockholders appraisal rights prior to sale of corporate property). And the Supreme Court consistently upheld its application. See, e.g., *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 124-27 (1948) (local incorporation law); *Texas v. United States*, 292 U.S. at 531-35 (local corporate headquarters).

Thus, in the 1920 Act, Congress "made a new departure," *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563, 585 (1922), pressing for consolidation of the nation's railroads in a legal environment that had long been hostile to such a notion. When, upon the recommendation of the ICC, see *Extension of Tenure of Government Control of the Railroads: Hearings Before the Committee on Interstate Commerce, United States Senate on the Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, 65th Cong., Vol. 1 at 231-305, 339-377 (1919) (remarks of ICC Commissioner Edgar E. Clark); *Return of the Railroads to Private Control: Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4378*, 66th Cong. at 8-139, 2857-2966 (1919) (same), it enacted into law a voluntary consolidation/immunity program—which the ICC had originally advocated in 1917, see *Report of the ICC to the Senate and House of Representatives*, 56 Cong. Rec. 45, 65th Cong., H. Doc. 503 (Dec. 5, 1917) (reprinted in 1918 *Annual Report* at 5-7)—it clearly meant to change that legal environment.

From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. *Cf. Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040, slip op. at 23 (D.C. Cir. July 18, 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties.

Moreover, in the legislative debates both on the 1920 Act and in 1926, when in the RLA it provided a framework for the regulation and enforcement of CBAs in the railroad industry, Congress exhibited a healthy respect for privately negotiated contracts; it rejected, for example, an amendment to the RLA that would have granted the ICC the power to suspend excessively generous wage agreements between carriers and their employees, in part on the ground that legislation abrogating labor agreements would be unconstitutional, *see* 67 Cong. Rec. 8884-86, 8892-93, 8896-97, 9190-91, 9196-97 (1926), and in part on the grounds that “there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached,” and that “[i]f agreement is to be resorted to [as a means of resolving labor management disputes], . . . the agreement should not be destroyed by placing in the act provisions which would have that effect.” S. Rep. No. 606, 69th Cong. at 5-6 (1926). And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach “all legal obstacles” to an ICC-approved transaction, or acted more specifically to bring “contracts” or

“collective bargaining agreements” within the reach of the statute.

Against this history as background, we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible. *Cf. Association of Flight Attendants, supra*, slip op. at 23. We recognize that other forces may operate to abrogate a CBA in the post-merger context, as, for example, when the NMB, pursuant to its power under § 2, *Ninth* of the RLA, 45 U.S.C. § 152, *Ninth*, decertifies a union following an operational merger. *See, e.g., International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). We simply do not think that Congress has lodged any such power in the ICC, particularly where, as in each of these cases, the CBAs at issue survived the ICC-approved merger and were not, apparently, questioned by the parties thereto until the present disputes arose—several years after the merger.

B. *The Railway Labor Act.*

At least one court of appeals has held that the immunity provision of the Act may operate to override provisions of the RLA. *Brotherhood of Locomotive Engineers v. Chicago & Northwest Ry. Co.*, 314 F.2d 424, 431-32 (8th Cir. 1963). We decline to address the question here, however, for two reasons.

First. The Unions question whether the ICC has the power to apply the immunity provision at all. They note that § 11341(a) is in terms “self-executing,” which we take to mean that its effect is not to be determined by the ICC when it passes upon a transaction, but rather by the appropriate tribunal for the resolution of a particular case in which it is invoked by a carrier as a defense to the application of some “other law.” They draw

support for this position from two footnotes in Justice Stevens's concurring opinion in *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 300 nn. 13 & 14 (1987), in which the four Justices to reach the merits so opined.

It is true that the ICC has in the past itself taken this position. See *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, 295 I.C.C. 696, 702 (1958) (nothing in the Act "authorizes us to determine and declare the particular laws within the scope of [the immunity provision] from which a carrier shall be relieved. The terms of [the provision] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act . . .") (citation omitted).

The ICC's statement in *Chicago, St. Paul* is correct to the extent that it means that the Commission is not required to determine what the effect of the immunity provision will be; the Supreme Court has long so held. *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27 (1932); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 391 (1922). The Court has also held, however, contrary to the implication of the first-quoted sentence from *Chicago, St. Paul*, that the ICC is authorized to make a determination, in approving a transaction, that laws standing in the way of its implementation must give way. See *Seaboard*, 333 U.S. at 124-27; *Texas v. United States*, 292 U.S. at 531-35; *Schwabacher*, 334 U.S. 182. See also *Gulf, Mobile & Ohio R.R. Co. Abandonment*, 282 I.C.C. 311, 335 (1952) (reading above cases as giving it the authority to set aside "State laws which prohibit in some way the carrying out of the transaction authorized"). Thus, we must reject the Unions' argument that the ICC lacks any power to consider a question of exemption that is properly presented to it.

Although the ICC's disclaimer of power in *Chicago, St. Paul* is overbroad insofar as it suggests that the ICC never has the power to determine a particular question of exemption, the result there can be reconciled with the Supreme Court cases cited above. In each of those cases the question of exemption arose before the consummation of the approved transaction; the issue was whether the ICC could, in the course of its approval of the transaction, remove a state law barrier to its effectuation. See *Schwabacher*, 334 U.S. at 200-01 (ICC may override state law granting dissenting stockholders right to block merger); *Seaboard*, 333 U.S. at 121; *Texas v. United States*, 292 U.S. at 531-32. As the Unions correctly note, *Chicago, St. Paul*—like the cases now before us—involved a carrier's request, submitted well after the consummation of the ICC-approved transaction, for exemption from the RLA. The ICC declined the carrier's request, saying:

It is apparent that the [RLA] has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of . . . conditions for the protection of employees, did not deal with employer-employee relationships.

295 I.C.C. at 702.

The ICC's broader disclaimer of any power to declare a carrier exempt from a law can thus be understood in the context in which it was presented; as the ICC interpreted the Act in 1958, it was without power to revisit an approved and successfully consummated transaction merely in order to relieve the merged carrier, after the fact, from the burden of complying with the RLA.

Even so understood, however, the ICC's holding in *Chicago, St. Paul* is still inconsistent with its current position; the transactions here at issue had long since been consummated when the ICC undertook to confer upon the merged carriers immunity from the RLA because it affected the "particular method for integration of the physical operations involved" 295 I.C.C. at 702.

An additional difficulty is presented by the ICC's ruling with respect to the RLA generally. The ICC's interpretation of the immunity provision, as of its 1958 decision in *Chicago, St. Paul*, was that Congress had not given it the power to override the RLA at all. It reaffirmed that view in 1967 in *Southern Railway Co.*, *supra*, when it stated that, in the absence of a stand-by agreement among the affected carriers and unions that would displace their existing CBAs in the event of a rail merger, "section 6 of the [RLA] would seriously impede mergers," 331 I.C.C. at 170-71—a statement that would not make sense if the agency thought it had the power simply to override § 6 "as necessary" to let an approved transaction go forward.

The ICC's current interpretation of the immunity provision departs from this view, but we have found no explanation for the departure, save a citation in *DRGW*—the 1983 case in which it adopted its current stance—and decisions following it, to the Eighth Circuit's 1963 decision in *Chicago & North Western Ry.*, *supra*. Because that case arose out of a dispute between a carrier and the unions representing its employees, however—a dispute to which the ICC was not a party—the court did not have the benefit of the agency's (then presumably contrary) views on the matter, nor did it cite any ICC precedent in support of its conclusion (apparently because, as of that time, none existed). For the ICC now to reverse its position solely on the basis of the court's holding is somewhat troubling, for three reasons. First,

in 1967, in *Southern Railway Co.*, the ICC was still of the view, the Eighth Circuit's intervening decision notwithstanding, that it lacked the authority to override the RLA. Second, in light of the ICC's close involvement with the historical development of the Act, it is disturbing that it would switch its position in unelaborated reliance upon a court case, which raised the issue in a different context and to which it was not a party, without giving any independent consideration to the matter. Third, the ICC has never related its current position to the context of the 1920 Act in which the immunity provisions first appeared; it has not, for example, related the original immunity provision in the 1920 Act to the comprehensive provisions of the same legislation governing labor-management relations, *see* 1920 Act, 41 Stat. 469-74—provisions that were, as we understand the legislative sequence, the immediate precursor to the RLA.

It may be that the ICC has made a conscious decision simply to depart from its earlier precedent. The ICC has not, however, said that it is doing so, much less articulated its reasons. As we stated in *Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986), "[w]e need hardly elaborate on the settled principle that an agency may not depart from its precedent without explaining and justifying its change in position."

Second. In light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA. In *The Carmen's Case*, the heart of the dispute before the ICC was whether either the Commission or, derivatively, the Committee, had the power to relieve CSX from the terms of Orange Book that, as the Committee had interpreted them, prohibited the proposed transfer of work and of employees. The RLA was implicated, as we understand

the dispute, only insofar as the Brotherhood argued that CSX could not unilaterally depart from the Orange Book without first complying with the procedures of the RLA. Because the ICC, in response, started from a premise (that § 11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the case to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

As for *The Dispatchers' Case*, the ramifications of our CBA ruling are somewhat less clear. There the CBA issue was whether the ICC could, by means of the immunity provision, relieve the N&W of obligations under its existing CBA in connection with the transfer of supervisory positions from Roanoke to Atlanta; the ICC said that it could, and we have held that it erred on that point. The RLA issues, as we understand them, were (1) whether the carriers could effect the transfer without first complying with the procedures of the RLA; and (2) whether the transfer, insofar as it deprived employees of rights under their CBA, violated the RLA. The second issue seems to drop out of this case for the same reason as the RLA issue appears to have become irrelevant in *The Carmen's Case*: because we hold that the ICC may not relieve the carriers of obligations under the CBA, the question whether it would violate the RLA to do so is purely hypothetical.

The first issue, if we are correct in stating it—the record on this point is less than crystal clear—may yet be alive. The ICC's opinion, however, gives us pause; it states that the continuation of the old agreement will "jeopardize the transaction"—by which it means not the merger but the transfer to Atlanta—"because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribu-

tion function." J.A. 291. Similarly, the carriers, as intervenors here, note that had the ICC not set aside the Roanoke CBA, its continuation "would have prevented the consolidation from going forward" Because we hold that the ICC was without authority to set aside that CBA, it is unclear how the carriers will proceed. They may find it both impractical to adhere to the Roanoke CBA in the Atlanta setting, because it would introduce non-uniform work rules, and uneconomical to renegotiate the Roanoke CBA in order to achieve such uniformity; if so, they may determine simply to transfer the employees back to Roanoke. There would then be no issue left, so far as we can tell, regarding their duty to comply with the procedures of the RLA.

In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine whether there is any live RLA issue remaining. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

C. Other Issues

We decline to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in *The Dispatchers' Case*, that § 4 of the *New York Dock* conditions gives the arbitration committee the "absolute right" to effectuate the transfer of employees, and to override any contrary provisions of a CBA. As noted earlier, the ICC has not argued the first theory to us at all; indeed, in its brief it took the position that the proceedings in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, — S. Ct. —, — (No. 87-1589, slip op. June 21, 1989) (*P&LE*), which was then pending before the Supreme Court, were not relevant here, even though its ex-

clusivity argument before the Supreme Court would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review. We do not consider as a basis for affirming the decisions a ground upon which the agency places no reliance on appeal. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

Because we hold that Congress did not, in enacting § 11341(a), give the ICC the power to override provisions of a CBA, we need not address either the Unions' arguments that to do so would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights. Our decision also makes it unnecessary to reach either (1) the Brotherhood's argument in *The Carmen's Case* that the ICC applied an improper standard when it reversed the Committee's ruling in favor of the Union; or (2) the Association's argument that the ICC, in its decision in *The Dispatchers' Case*, deprived employees of their rights under § 2, *Fourth* of the RLA.

IV. CONCLUSION

Because § 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees, we grant the petitions for review in that respect and reverse the ICC's decision. We remand the cases with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the
United States of America,
Respondents

Norfolk & Western Railway Co. and
Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

It is ordered, by the Court, *sua sponte*, that the opinion of the Court filed on July 25, 1989 is amended as follows:

At Page 2, last line

delete the word "cases" and insert in lieu thereof the word "records"

At Page 24, line 9

delete the word "case" and insert in lieu thereof the word "record"

At Page 26, last paragraph, line 5

delete the word "cases" and insert in lieu thereof the word "records"

At Page 26, last paragraph

Add the following new text:

See General Rule 15(c).

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus

for Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

Decided: May 24, 1988

The American Train Dispatchers Association (ATDA) seeks review of an arbitration panel's decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, (Harris, May 19, 1987) ("referee's award"). Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a joint reply. ATDA invokes our jurisdiction to review the referee's award under the standards announced in *Chicago & North Western Tptn. Co. - Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision). The carriers agree that we have jurisdiction but urge that the arbitration decision be affirmed.

We are accepting administrative review of this arbitration decision because it involves a dispute under the labor protective conditions imposed in *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*), and raises significant issues of general

importance regarding the interpretation of those conditions.¹ See *Lace Curtain, supra*.

Lace Curtain essentially adopted the standard enunciated by the Supreme Court in the so-called *Steelworkers Trilogy*.² In reviewing arbitral resolutions of disputes arising under collective bargaining agreements, courts do not vacate awards because of substantive mistake unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority. *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982). We adopted similar standards.

BACKGROUND

In 1982 in *Norfolk Southern Control*, this Commission authorized Norfolk Southern Corporation (NS) to acquire control of the separate railroad systems of N&W and Southern under 49 U.S.C. 11343, subject to the employee protective conditions in *New York Dock Ry. - Control - Brooklyn East. Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). On Sep-

¹ On January 5, 1988, ATDA filed a so-called supplement to its earlier petition to review the arbitration award. It submitted a corrected filing on January 15, 1988. The carriers replied on January 26, 1988. The supplement is apparently intended to show that the award has potentially wider ramifications than the instant dispute and is being used by the carriers as precedent for adverse actions against ATDA members at other locations. The carriers deny that any breach of agreement has occurred and state that the practice ATDA mentions has been in effect for 28 years.

We need not address this matter further, because it appears that, even if an adverse action has occurred, it is wholly unrelated to the instant dispute. The proper procedure is for petitioners to submit such additional disputes to arbitration, where they can be resolved on their own merits on a complete record.

² *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tember 12, 1986, N&W and Southern notified ATDA that they intended to coordinate N&W's "distribution of power" work from an N&W facility in Roanoke, VA, to a Southern facility in Atlanta, GA. Distribution of power refers to the assignment of locomotives to particular locations and trains. At N&W, the work had been performed by Systems Operations Control (SOC) supervisors who are represented by ATDA in a collective bargaining agreement with N&W.³ Under the carriers' coordination plan, the N&W work would be centralized into the Southern Railway Control Center, which would be responsible for the distribution of power for the entire combined N&W/Southern System. The work would be performed by Southern's Superintendents of Transportation (ST), who historically have been considered as management employees and as such would not be subject to a collective bargaining agreement. In a proposed implementing agreement, N&W and Southern offered the SOC supervisors the opportunity to follow their work by granting them first consideration for new ST positions to be created on the Southern, which are higher paid than the SOC positions on the N&W.

It is the intent of the carriers ultimately to distribute locomotive power throughout the combined system without regard to the historical territorial division, generally north-south, between N&W and Southern. Instead, power distribution functions would be aligned along an assertedly more

³ In 1964, the former New York, Chicago, and St. Louis Railroad Company (the Nickel Plate) was merged into N&W, which agreed to assume all the Nickel Plate labor contracts including a 1951 agreement with ATDA. On August 2, 1968, the National Rail Adjustment Board in Award No. 16556 sustained ATDA's claim that the newly established N&W position of "power supervisor" embraced work subject to the agreement. Consequently, on April 1, 1971, N&W and ATDA executed a memorandum of agreement which recognized that the distribution of power by SOC supervisors was to be subject to the collective bargaining agreement between N&W and ATDA. The latest such agreement, executed in 1979, is still in force. It is not a part of the record in this proceeding, but there is no dispute between the parties as to its terms.

efficient east-west division of the combined system. This will permit substantial cost savings because fewer locomotives will be needed and the remaining locomotives can be used more efficiently. Moreover, the technology and procedures at Southern's Railway Control Center differ from N&W's in that Southern ST's have computer access to other divisions whereas the N&W SOC supervisors produce internal information that is displayed on a board located at the center. Thus, while N&W's SOC supervisors were given first consideration for the new jobs, the carriers have been unwilling to assign the transferred SOC supervisors the same duties and territorial responsibility they had on the N&W.

Believing that the proposed work coordination was a part of the *Norfolk Southern Control* transaction, the carriers opened negotiations with ATDA under Article I, section 4 of *New York Dock* in an effort to reach a mutually acceptable implementing agreement. After negotiations proved unsuccessful, the carriers invoked mandatory arbitration. A 3-member panel was selected, and a hearing held before a neutral referee.⁴ The referee's award found (organization member Mahoney dissenting) that: the transfer was authorized by this Commission in *Norfolk Southern Control*; the arbitral issue was the proper application of *New York Dock* standards; and Article I, section 4 of *New York Dock* empowers the arbitral panel to modify existing collective bargaining agreements or to approve the transfer of work from a location subject to an agreement to a location where no agreement will apply. Accordingly, a revised implementing agreement submitted by the carriers (which granted SOC supervisors consideration, but no priority, for ST jobs) was placed in effect.⁵

⁴ The neutral, Mr. Harris, was selected by the National Mediation Board (NMB) when the two partisan members were unable to agree on a neutral.

⁵ The carriers' original proposed agreement and ATDA's proposed agreement were rejected as going beyond the terms of *New York Dock*,

In a decision served June 10, 1987, we denied ATDA's petition to stay the referee's award. Subsequently, the carriers effected the coordination of work and offered Southern ST positions to all nine active and three furloughed N&W SOC supervisors. Nine of the twelve accepted and are now so employed; two declined and one retired. There were no displacements of other employees.

DISCUSSION AND CONCLUSIONS

Article I, section 2 of *New York Dock* requires that collective bargaining rights be preserved in a section 11343 transaction. Also, the Railway Labor Act (RLA) contains extended dispute resolution procedures and prohibits any unilateral change in rates of pay, rules, or working conditions during pendency of those procedures. However, Article I, section 4 of *New York Dock* provides for compulsory, binding arbitration of disputes. It has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission.⁶ Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. 11341(a) exempts from other law a carrier participating in a section 11343 transaction as necessary to carry out the transaction.

ATDA argues first that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the RLA, and the arbitration panel's authorization

and the parties were thus given 14 days to negotiate revisions to the adopted agreement.

⁶ The panel notes (p. 14) that the arbitration panel was created under the *New York Dock* conditions and then states, "[A]s a creature of the ICC, this panel is bound to the ICC view." We agree.

of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned, and thus was not exempted, in the Commission's authorization in *Norfolk Southern Control*.

In our June 10th stay decision, we rejected this line of argument. We found that the arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the control transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission because, as we stated at pp. 6-7 in Finance Docket No. 30532, *Maine Central R.R. Co. et al. - Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985 (*Maine Central*) (quoted in the referee's award at 12):

It is the Commission order, not RLA or [the Washington Job Protection Agreement of 1936] that is to govern employee-management relations in connection with the approved transaction. Such a result is essential if transactions approved by us are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions . . . Since there is no mechanism [in RLA] for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

Similarly, there can be no assurance that post-consummation coordinations contemplated as part of the transaction could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the panel correctly found (referee's award at 12-14) that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. *Maine Central, supra*, at 6-7. Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a). *Brotherhood of Loc. Eng. v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. See referee's award at 10-11. The carriers do not disagree. The arbitration panel, citing *Maine Central*, correctly exercised its jurisdiction over the dispute arising from the transfer. See *Brotherhood of Loc. Eng. v. Chicago & North Western Ry., supra*; compare *United Transp. Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987).

Nor does the collective bargaining agreement between N&W and ATDA impair the panel's jurisdiction to authorize the transfer. See *Maine Central, supra*, at 6, 7 n.11 (rejecting argument that the preservation of collective bargaining rights and agreements in Article I, Section 2 of *New York Dock* somehow displaced the Article I, Section 4 mechanism for resolving disputes). See also, *Brotherhood of Locomotive Engineers v. ICC*, 808 F.2d 1570, 1576-78 (D.C. Cir. 1987) (collective bargaining rights normally preserved pursuant to Commission-imposed labor protection conditions must give way to permit consummation of a Com-

mission-approved transaction despite unilateral management change of working conditions.) Moreover, in Finance Docket No. 30,000 (Sub-No. 18), *Denver and R. G. W. R.R. Co.—Trackage Rights—Missouri P. R.R. Co. Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October 25, 1983, *rev'd sub nom. Brotherhood of Loc. Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds* — U.S. —, 107 S.Ct. 2360 (June 8, 1987), *cert. den.* — U.S. —, 107 S.Ct. 3209 (June 15, 1987) (*DRGW*), we found that:

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under [49 U.S.C.] 11347 preserve conditions and agreements in the context of the authorized transaction.

ATDA further contends that, even if the arbitration panel had authority to override the collective bargaining agreement and the RLA, it should not have done so. Assertedly, the transfer of power distribution work to Atlanta could have been effected without abrogating the SOC supervisors' collective bargaining and contract rights, because the continuation of those rights would not create a "risk of non-consummation." See *Maine Central*, *supra*. The jobs could simply be transferred subject to the collective bargaining agreement. ATDA notes that the arbitration panel made no factual finding that abrogation of the agreement was necessary to the transfer, much less to the ultimate control transaction. Rather, the referee's award simply states (*id.*

at 15): "It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along * * *."

In reply, the carriers acknowledge that the referee's award did not recite the record evidence upon which the panel based this conclusion. However, the carriers contend that, under the *Steelworkers Trilogy* standards, an arbitrator need not give his reason for an award and is entitled to deference in his ultimate factual findings. In any event, they argue, the record shows that the collective bargaining agreement would be inconsistent with and would frustrate the purpose of the coordination by preventing the carriers from realigning SOC job responsibilities to officer status and thus creating an integrated systemwide facility without regard to the historical N&W-Southern separation. In their view, ATDA's proposal would result in covered employees being limited to the work previously performed in Roanoke by SOC supervisors and to their work rules and lower salary schedule.

In *Lace Curtain*, we stated that "[w]e do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions." We believe that this is precisely the nature of the review ATDA seeks. Petitioner does not contend that the referees' award contains egregious error, fails to "draw its essence" from the *New York Dock* conditions, or exceeds the panel's authority under *New York Dock*. Instead, in regard to this issue, it criticizes the panel's judgment and lack of detailed discussion. These alleged shortcomings are not matters we would review under *Lace Curtain*.

In any event, the record supports the conclusion of the arbitration panel. Imposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function.

Moreover, ATDA's unsupported allegation that jobs can be transferred subject to the agreement misconstrues the nature of the transaction. It is the work function, not jobs, that will be transferred, and new jobs will be created to perform this and other functions.

The referee's award is somewhat confusing on the related issue of whether Southern must recognize ATDA as the bargaining representative of the transferred SOC supervisors. Representation is a collective bargaining "right" and, as such, is protected by Article I, section 2 of *New York Dock*. The panel suggests (*id.* at 15) that its award abrogates not only the collective bargaining agreement but ATDA's representative status as well, yet it acknowledges (*ibid.*) that ATDA's rights as an incumbent bargaining representative are for determination by the National Mediation Board (NMB). It also acknowledges that the former SOC supervisors may join with the Southern ST's as a bargaining unit and petition the NMB for the selection of a bargaining representative.

We find that, under the circumstances present here, *New York Dock* does not preempt any NMB determination as to representation, as the panel seems clearly to have recognized. To the extent the award could be construed as suggesting otherwise, that construction is erroneous. This is not to say that ATDA may in fact retain its status. That, as the panel recognized, is for the NMB to determine, and we recognize that there are legal as well as practical obstacles to such recognition.⁷

⁷ The policy of the NMB is to recognize systemwide bargaining units. ATDA correctly points out that exceptions have been made, but the case it relies on, *Burlington Northern, Inc. v. American Railway Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), is inapposite because its recognition of a less-than-systemwide class was based on the common law of contracts. It is unclear whether Southern's status as a successor employer mandates an exception to the NMB policy.

The courts have apparently not addressed this issue under the RLA.

Finally, ATDA complains that the panel improperly imposed the carriers' proposed implementing agreement and not ATDA's. ATDA's proposed agreement provided for enhanced economic benefits, as well as continuation of its collective bargaining agreement. The panel concluded that ATDA's proposed implementing agreement, and the carriers' initial proposed agreement as well, could not be imposed because they went "beyond the terms of an implementing agreement set forth in *New York Dock*."

ATDA contends that the *New York Dock* conditions are only a baseline, which the arbitrator may exceed. It contends further that the panel mistakenly assumed that it must adopt one of the proffered agreements in its entirety. We noted in our June 10th stay decision that ATDA has raised an interesting and perhaps significant issue concerning the authority of the arbitration panel. As such, we will review the panel's determination as meeting the *Lace Curtain* criteria for review.

We fashioned the *New York Dock* conditions to satisfy the level of employee protection mandated by section 11347. We have consistently recognized our authority to require a greater level of protection in any given case. See Finance Docket No. 30965, *Delaware & Hudson Ry. Co. - Lease and Trackage Rights Exemption - Springfield Terminal Ry. Co., et al.*, 4 I.C.C.2d ____ (served February 25, 1988). It does not follow, however, that, once we determine the appropriate level of protection, an arbitrator is free to impose a higher level. On the contrary, the arbitration panel's au-

Under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, a successor employer may in some circumstances be obligated to recognize and bargain with the representative of its predecessor's employees. See *John Wiley & Sons, Inc. v. Livingstone*, 376 U.S. 543 (1964) and *NLRB v. Burns International Security Services Inc.*, 406 U.S. 272 (1972). NLRA cases are not controlling but have been held to offer an analogy in the solution of similar RLA problems. See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), *reh. den.* 394 U.S. 1024 (1969).

thority is derived solely from the *New York Dock* conditions themselves, and nothing in those conditions authorizes the arbitrator to expand the basic benefit structure prescribed by the Commission. Rather, it is the arbitrator's task to determine the appropriate *application* of conditions prescribed by the Commission. The proper forum for employees seeking a level of labor protection in excess of *New York Dock* is thus not in the arbitration of individual disputes but rather before this Commission where we consider the merits of the section 11343 transaction. In fact, in *Norfolk Southern Control*, labor interests sought a higher level of protection, but we found that *New York Dock* was appropriate. 366 I.C.C. at 229-31. In so doing, we did not delegate to an arbitrator the authority to overturn this determination.

Of course, an arbitrator has discretion to fashion a remedy within the limits of *New York Dock*. To this end, he may combine specific proposals of the parties, may develop compromises, or may even develop his own conditions, limited only in each case by the Commission-mandated level of protection. Nothing in the referee's award demonstrates a misunderstanding of this principle. On the contrary, the referee's award expressly modifies the proposed implementing agreement by adding a condition that the parties meet to consider whether any mutually agreeable revisions could be imposed.

ATDA does not contend that the higher level of protection it seeks is consonant with *New York Dock*. In fact, it tacitly acknowledges that the implementing agreement adopted by the panel provides the minimum economic benefits described in Article I, section 9 of *New York Dock*. It follows that the additional economic benefits ATDA proposed, i.e. priority consideration for ST positions,⁸ transfer of accrued va-

⁸ The proposal for priority consideration is moot in light of Southern's hiring of all willing SOC supervisors. The record does not indicate whether those who declined Southern positions would be eligible for the proposed displacement allowance.

cation and sick leave, additional moving allowances,⁹ and displacement allowances for employees who choose not to follow their jobs, exceed *New York Dock* and were properly rejected.¹⁰ As noted above, ATDA's proposal that its collective bargaining agreement be maintained (mischaracterized in ATDA's petition as a proposal for continued representation) was also properly rejected. In the circumstances, it is inconsequential that the panel did not explain exactly how the implementing agreements it rejected exceeded *New York Dock*.

The referee's award will be affirmed. This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association* is affirmed.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

⁹ The carriers state in this regard (reply, p. 20) that, "[b]y virtue of being Southern Railway officers, the former SOC supervisors have already received a generous package of relocation benefits." See also reply, p. 31.

¹⁰ A particular benefit may "draw its essence" from *New York Dock* without being specifically enumerated there. ATDA has made no such allegation here.

COMMISSIONER LAMBOLEY, dissenting:

The decision of the arbitration panel failed to appropriately accommodate the aspects of representation and recognition under the RLA with the consolidation transaction under the ICA. In my view, the failure to do so requires reversal and remand.¹

The matter should be remanded to the arbitration panel with instructions to reconcile the perceived RLA/ICA conflict and effect a balancing of interests necessary to achieve transfer of SOC work activity from Roanoke to Atlanta without termination of representation rights or other unnecessary displacement of RLA rights. It should be recognized that Section 11341(a) does not operate in absolute terms exempting application of other laws, rather only to the extent necessary to carry out the proposed transaction. Moreover, conditions imposed under Section 11347 operate to preserve conditions and agreements in the context of the authorized transaction, whenever possible. Thus, assuming the transaction at issue is proximally within the scope of the approved transaction, the arbitraion must specifically determine whether, and to what extent, (1) other laws need be necessarily displaced and (2) existing

¹ Because I find representation and recognition the central issues on appeal, I do not address the disposition of other issues in this case. Although causation is neither free from doubt nor necessarily clear after reviewing the original consolidation case or the underlying panel decision, I do assume the transfer transaction here at issue is one reasonably contemplated or foreseeable as a consequence of the 1982 consolidation transaction approved in the *NS-Control* case. Consequently, the transaction is properly subject to the *NY Dock* conditions and dispute resolution procedures.

In short, while distant in time, it has not been satisfactorily established on the record that transfer does not have a proximate nexus with original consolidation. See *Southern Railway Company - Control - Central of Georgia Railway Company*, 317 I.C.C. 729 (1963) aff'd sub. nom. *RLEA v. U.S.* 266 F. Supp. 521 (E.D. Va 1964) vacated on other grounds 379 U.S. 199 (1984). This is not to say on remand such a showing could not be made in this case.

working conditions and provisions of collective bargaining agreements are in conflict with the transaction approved by the Commission.²

For the Commission's part, I believe the majority's affirmation of the panel decision merely compounds the error on appeal. The majority attempts, after a fashion, to rationalize a position affirming the arbitration award. The reasoning is not altogether clear.

Representation rights accorded to employees, individually and as a group, under the RLA basically provide that employees shall have the rights (1) to select a representative chosen by the majority and (2) to have the representative so chosen recognized by their employer for the purposes of collective bargaining.³ It is from provisions of the RLA, not the collective bargaining agreement, that the right to representation and recognition derive. Indeed, the contrary is true; it is the collective bargaining agreement which is derived from the exercise of the rights of representation and recognition.

In this case, ATDA has been selected as the employee representative, and has been recognized as such by the employer, initially the N&W,⁴ and now, following the *NS-Control* merger/consolidation, the NS.⁵

² See generally *Schwabacher v. United States*, 334 U.S. 182 (1948); *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) Cert den. 435 U.S. 950 (1978); and *Denver & R.G.W. R.R. Co. - Trackage Rights - Missouri Pac. R.R. Co. Between Pueblo Co. and Kansas City, MO* (not printed), served October 25, 1983; revs'd sub. nom. *BLE v. I.C.C.* 761 F.2d 714 (D.C. Cir. 1985) revs'd on other grounds — US — (1987). Also *Leavens v. Burlington Northern*, 348 I.C.C. 962 (1977).

³ 45 U.S.C. §152.

⁴ This flows from the 1964 Nickel Plate merger, assumption of contracts, the 1968 NRAB Award No. 16566, and the 1979 Agreement.

⁵ If the employees, although subject to transfer, nonetheless remain employees, their employer, i.e. the entity with ultimate employment authority, is the NS. The *NS-Control* case confers such authority and

In this instance then, the status of representation and recognition may not be terminated by a transaction under the ICA. Exclusive jurisdiction over representation issues belongs to the National Mediation Board under the RLA.⁶

Both the arbitration panel and Commission majority acknowledge that basic proposition, but nevertheless, proceed to terminate RLA representation rights. The RLA rights at issue here are not in conflict with the ICA. Although in the absence of an agreement or an appropriate order, the portability of the collective bargaining agreement may be open to question,⁷ the portability of representation and recognition rights are not so dubious. Indeed, such rights and status are generally presumed to continue until the contrary is shown.⁸

The arbitration panel was in error in finding that "this (transfer) does not change the rights of individual employees".⁹ Such rights have surely been changed, both individually and collectively, despite their establishment and protection under the RLA.

The panel was simply wrong when it asserted "what is lost by the transfer is the incumbency status of the ATDA,

status on NS. To conclude otherwise would deny NS the requisite control authority to effect the transfer under the ICA, and the corresponding ICA jurisdictional considerations here. In another case, the RLA alone would apply to changes here proposed if employer status was confined to N&W. Indeed, the entire proceedings are premised on ICA jurisdiction and *NS-Control*, both before the arbitration panel and the Commission.

⁶ See e.g., 1943 "Switchman's Union" Trilogy; *Switchman's Union of N.A. v. NMB*, 320 U.S. 297; *Gen. Comm. v. M-K-T R. Co.*, 320 U.S. 323, *Gen. Comm. v. Southern Pac. Co.*, 320 U.S. 388.

⁷ See *Burlington Northern, Inc. v. Am. Ry. Super. Assn.*, 503 F.2d 58 (7th Cir. 1974) Cf. *Norfolk & Western R. Co. v. Nemitz* 404 U.S. 37 (1971); *Laturner v. BN, Inc.*, 501 F.2d 593 (9th Cir. 1974) and *Miller v. Missouri Pac. Ry. Co.*, 372 F. Supp. 170 (W.D. LA 1974).

⁸ See *Dooley v. Lehigh Valley R. Co.*, 21 A2d 334 (NJ e.g. 1941).

⁹ Award, p. 15.

a status arrived at through recognition, not through election."¹⁰ Not only does this statement seemingly confuse the status of recognition with the process by which employees select their representative, it is clear that the legally protected status of recognition of an employee representative is the same whether achieved through voluntary recognition by an employer or as a mandatory result of an election process. The panel's attempted distinction is not only contrary to law,¹¹ it is contrary to fact.¹²

The panel, likewise, erred when it concluded that "the protection afforded by New York Dock are to individual employees, not their collective bargaining representatives".¹³ First, as mentioned previously, the rights at issue are those of the employee, individually, and collectively, flowing from and protected by statute. The essence of representation and recognition is the right of individual employees to act collectively through a freely selected representative. It is that employee right ATDA is here asserting as the employees' representative, and for which ATDA has an affirmative obligation and duty to do so.¹⁴ The panel's position suggests that employees themselves, rather than their representatives are somehow the proper and necessary parties to here claim representation and recognition rights. This position I find wholly untenable.

¹⁰ Id.

¹¹ See *Assn of Flight Attendants, et al. and TWA, N.M.B. No. 63* (1987); also *Akron, Canton & Y. R. Co. v. IBEW*, 237 F. Supp. 343 (N.D. Ill. 1964).

¹² N&W's Recognition of ATDA was initially voluntary, and later was required by the National Rail Adjustment Board in Award No. 16556 (1968).

¹³ Award, p. 15.

¹⁴ The duty of fair representation is an evolutionary product of federal common law with statutory origins. See e.g. 45 U.S.C. §152 (ninth), *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

Without doubt, no tribunal established under the ICA may claim authority to terminate representation rights. The arbitration panel expressly acknowledges its jurisdictional limitations,¹⁵ but nonetheless proceeds to effectively terminate those rights. On appeal, the majority of the Commission also acknowledges that the ICA cannot and does not pre-empt RLA representation rights, yet in its affirmation, exercises its authority to approve termination of RLA rights.

In my view, this case should be remanded to the arbitration panel for purposes of accommodating RLA representation rights and/or seeking views of NMB regarding construction of such rights in instances of transfer within a commonly controlled, merged rail system.¹⁶ The latter course may be particularly helpful since this admittedly is a case of first impression, and the NMB has long been recognized as being vested with exclusive authority over representation issues.¹⁷

¹⁵ Award p. 15.

¹⁶ See comment on "employer" status of NS as successor employer in context of merger. (Footnote 4). Obviously, an ICA control case does not bind the NMB in determining employer status for purposes of the RLA.

¹⁷ Cf. *Southern Ry. Co. v. Combs.*, 484 F.2d 145 (6th Cir. 1973), suspension of proceedings and referral to NMB under doctrine of "primary jurisdiction."

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the
United States of America,
Respondents
Norfolk & Western Railway Co. and
Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus
for Robert A. Bonner
Deputy Clerk

Date: July 25, 1989

Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the
United States of America,
Respondents
Norfolk & Western Railway Co. and
Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Intervenor CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus

for Robert A. Bonner

Deputy Clerk

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the
United States of America,
Respondents

Norfolk & Western Railway Co. and
Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 29 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

The Suggestions For Rehearing *En Banc* of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus

for Robert A. Bonner
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724

September Term, 1989

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the
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Respondents
Norfolk & Western Railway Co. and
Southern Railway Company,
Intervenor

United States Court of Appeals
For the District of Columbia

FILED SEP 29 1989

CONSTANCE L. DUPRÉ

CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of the Interstate Commerce Commission (ICC) and of the motion of petitioners for leave to file a response thereto it is

ORDERED, by the Court, that the Clerk is directed to file petitioners' lodged response and it is

FURTHER ORDERED, by the Court, that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Wendy Jemus

for Robert A. Bonner

Deputy Clerk